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No. 89-438

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC.,
A New Jersey Corporation,

Petitioner,

vs.

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER, GREG'S HESS STATION, INC.

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I. The Condemnation Clause Cited by Respondent Affects Neither the Existence of Petitioner's Claim, nor the Reasons Why Certiorari Should be Granted.

In opposing the grant of certiorari the State of New Jersey seeks to rely on the terms of a condemnation clause in the lease-franchise agreement between petitioner and Amerada Hess. In so doing, it has misconstrued the terms and effect of that clause. That clause, set out at pp. 2-3 of Respondent's brief, provides:

> If the Station or any part thereof is taken or condemned for a public or quasi-public use, this Agreement shall, at the option of Hess, terminate as of the date title shall vest in the condemnor and dealer shall have no claim or interest in or to any award of damages for such taking, including but not limited to any claim for the value of any unexpired portion of the term of this Agreement, and assigns to Hess all claims and rights in connection with any such taking or condemnation, and agrees to execute any documents in connection therewith or in confirmation thereof.

This clause by its terms applies only to the lease interest in the real property condemned, and not to the value of the franchise portion of the arrangement. It comes into effect only when all or part of the station premises is condemned, and returns to Hess the whole fee by cutting off claims against the award to Hess "for such taking" (of the premises, that is, the realty). This was the clear intendment of the clause by its drafter, Hess, and is the construction given to that clause by Amerada Hess Corporation at pp. 2-5 of its brief filed with this Court on October 2, 1989. The clause was not

intended to bestow upon the State, as third party beneficiary, the right to refuse to compensate for property taken beyond the real property interest, such as the non-transferable franchise business destroyed by the taking in this case.

The most this clause can mean is that Petitioner is entitled to compensation only for the value of the lease-franchise package less the value of the lease, which was arguably already included in Hess's unitary award for the fee value of the land. There exists a lease market in gas station premises without franchises, and a secondary market in franchises which are not part of lease-franchise arrangements. See generally, Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 Seton Hall L. Rev. 483 (1985), at 487-488. Thus, even if the condemnation clause is given effect, the valuation of the Petitioner's retained property interest destroyed by the taking of the premises presents a garden variety direct damages valuation problem on remand. In fact, it is not clear that the condemnation clause would even be given this effect on remand after the Constitutional requirements of just compensation are clarified by this Court, since the Supreme Court of New Jersey reserved the question of its validity and effect under New Jersey law in its opinion on the state law issues in this case, finding it unnecessary to reach the issue to dispose of the case as a matter of state law. *State by Com'r of Transp. v. Hess Realty*, 115 N. J. 229, at 230 (1989). Petitioner's App., p. 50.

Finally, no one disputes, not even the State, that the franchise business represents a significant amount of destroyed value – value the State never paid for. This is

the only necessary predicate to the Consfitutional issues raised in this petition for certiorari.

II. The Definition of Compensable Property in the New Jersey Eminent Domain Act is Irrelevant to the Case and to the Proper Disposition of the Petition for Certiorari.

The State's reliance on the definition of compensable property in the New Jersey Eminent Domain Act is completely misplaced. It is true that the Constitution itself does not define protected property for purposes of just compensation, and that state law is the main source of legal protection that creates constitutionally protected property (although valid federal statutory or common law can have the same effect, vide, here, the Petroleum Marketing Practices Act, 15 U.S.C. sec. 2802 et seq.). However, it is clear that it is the State's whole law in regard to the interest that controls, and that the State may not create an interest that is property in every other context, and then define it as non-property for just compensation purposes. This claimed right so to define property was strongly rejected in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), where this Court said that a sovereign cannot "by *ipse dixit* transform private property into public property without just compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 1012, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Certainly there can be no doubt of the protected property status of a franchise business in general and of a petroleum marketing franchise in particular under New Jersey law after the New Jersey Supreme

Court's decision on the breadth and strength of its legally protected status in a private context in *Westfield Centre Serv. v. Cities Serv. Oil Co.*, 86 N. J. 453, 432 A. 2d 48 (1981). The claim that Petitioner's franchise business is not legally protected property under the Constitution is without merit.

III. The Remaining Arguments of the Respondent in Opposition to the Grant of Certiorari are Unpersuasive.

The balance of Respondent's brief is a pastiche of untenable arguments drawn almost directly from the pages of *Nichols' Law of Eminent Domain*. For instance, Respondent asserts, at p. 10 of its brief, that contract created rights are only compensable property under the Fifth Amendment if the State benefits directly by substituting itself for the injured party as the contract beneficiary. This flies in the face of *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), requiring compensation for the destruction of contract-created liens as a result of the Bankruptcy Reform Act, even though the benefits of the abolition ran to private persons and not the Government. See Risinger, *Just Compensation, supra*, at 513-515. The Respondent's brief also asserts, at p. 10, a more general, but no more tenable, version of the claim that the State must only compensate for what it takes to use, not what it destroys. This claim is inconsistent with *Monongahela Navigation Co. v. U. S.*, 148 U.S. 31 (1893), *Kimball Laundry Co. v. U. S.*, 338 U.S. 1 (1949), *Almota Farmers Elevator and Warehouse Co. v. U. S.*, 409 U. S. 470 (1973), *Security Industrial Bank, supra*, and *Ruckelshaus v. Monsanto, supra*, among others. In none of those cases did

the government use what it was required to pay for under the Constitution.

When the chaff is winnowed, the State's main argument rests on two extremely short opinions from the early 1920's, *Bothwell v. U. S.*, 254 U.S. 31 (1920), and *Mitchell v. U. S.*, 267 U.S. 341 (1925). Essentially, the assertion is that *Bothwell* and *Mitchell* say "no business damages" and mean "no, business damages". Professor Risinger has analyzed the facts, the records and the opinions in those cases at length, and concludes that they do not stand for such a proposition. Risinger, *Just Compensation, supra,* at 504-510. However, even if they do they would then be at odds with the reasoning and result of *Kimball Laundry, supra,* and *Almota Farmers, supra,* and the reasoning of *Armstrong v. U. S.*, 364 U.S. 40 (1960), *Security Industrial Bank, supra, Webb's Fabulous Pharmacies, supra,* and *Ruckelshaus v. Monsanto, supra.* If a conflict among circuits is a good reason to grant certiorari, how much more so is such a conflict in the authorities of this Court itself? The writ should be granted.

Respectfully submitted,

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